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Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, Room 222
Washington, D.C. 20554

RECEIVED

AUG 27 1997

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Re: *Ursus Telecom Corp. Ex Parte Filing, Rules and Policies on Foreign Participation in the U.S. Telecommunications Market, IB Docket No. 97-142*

Dear Mr. Caton:

Ursus Telecom Corp. ("Ursus"), by its attorneys, respectfully submits this letter in connection with the above-captioned proceeding to establish rules to govern foreign carrier participation in the U.S. telecommunications market in light of the World Trade Organization ("WTO") agreement on basic telecommunications services.^{1/} Recent anticompetitive actions by the dominant telecommunications company in South Africa, which is controlled by a U.S. carrier, demonstrates that the FCC's proposed post-WTO rules on foreign carrier participation must expressly prohibit U.S. carriers from inhibiting competition on international routes on which they own or control a dominant foreign carrier.^{2/}

Relief Requested

By this letter, therefore, Ursus urges the Commission to apply to *U.S. carriers with affiliation interests in foreign carriers*, as well as to U.S. carriers that are owned by foreign carriers, its proposal (1) to reject applications that pose a high risk to competition and (2) to impose additional dominant carrier safeguards on certain foreign-affiliated carriers on a case-specific basis.^{3/} Application of the

^{1/} Ursus is a U.S.-based carrier that provides telecommunications services between the United States and a number of countries. Among other things, Ursus provides services to customers that access Ursus' U.S. network through "call back" mechanisms.

^{2/} See *Prohibition of Call-Back Operations In South Africa*, issued by the South African Telecommunications Regulatory Authority ("SATRA") (August 12, 1997), attached as Attachment 1. SATRA took its action at the behest of Telkom, the monopoly telephone company in South Africa. Telkom is controlled (through equity-based representation and contractual relationships) by SBC Communications Inc. ("SBC"), a U.S. carrier.

^{3/} See *Rules & Policies on Foreign Participation in the U.S. Telecommunications Market*,

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Commission's foreign entry and dominant carrier safeguards to a U.S. carrier with an interest in a dominant overseas carrier affiliate is required by the United States' obligations to comply with the WTO principles of "Most Favored Nation" ("MFN") and "National Treatment" ("NT") if the FCC applies such safeguards to foreign-owned U.S. carriers. Such treatment is also required by the FCC's own public interest goals. Where it has the authority to prevent U.S. carriers from undermining its pro-competitive policies, the Commission must continue vigorously to exercise its authority to enhance competition on international routes.

The Commission should also, as a corollary, clarify the types of anticompetitive activity that would lead either (1) to rejection of a Section 214 application filed by a U.S. company that owns an affiliation interest in a foreign carrier on a particular route or (2) to the limitation of Section 214 authority previously granted. In determining the risk to competition, the FCC should consider all evidence of anticompetitive activity by the entrant's foreign affiliate, especially that relating to activity which undermines competition on the route in question or is blatantly inconsistent with important FCC policies.^{4/} Where a U.S. carrier that holds an interest in the dominant foreign carrier on the route engages in, promotes, or encourages such anticompetitive activity, the FCC should be particularly concerned that Section 214 authorization will pose a risk to competition in the U.S. market. In such cases, the FCC should use its authority to deny an application or revoke an authorization and therefore prevent a U.S. carrier from inhibiting competition in the U.S. market through leveraging its foreign affiliation.

Introduction

Ursus commends the FCC's role in achieving the WTO agreement ("Agreement") and the Commission's subsequent efforts to ensure U.S. compliance with that agreement. As this proceeding is an integral part of the United States' implementation of the Agreement, Ursus strongly urges the FCC to craft rules that not only are consistent with the United States' WTO commitments and WTO principles of Most Favored Nation ("MFN") and National Treatment ("NT"), but also are effective in deterring anticompetitive conduct.

In its NPRM, the FCC has proposed rules to govern foreign carrier entry into and participation in the U.S. market in the post-WTO environment. Therefore, the FCC has proposed to eliminate its Effective

^{3/} (...continued)

IB Docket No. 97-142, *Order & Notice of Proposed Rulemaking*, FCC 97-195 (released June 4, 1997) ("WTO NPRM").

^{4/} Such activity may include, for example, discrimination with respect to operating agreements or inhibiting the provision of call back services.

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Competitive Opportunities (“ECO”) test^{5/} for carriers from WTO member states and to reject Section 214 applications filed by foreign affiliated carriers from WTO member states only when there is very high risk to competition.^{6/} At the same time, the Commission has proposed to continue to impose dominant carrier safeguards on all carriers with foreign affiliates who have market power on a particular route.^{7/} The FCC has also proposed to impose additional dominant carrier safeguards on carriers with foreign affiliates from WTO member states that have not implemented competition.^{8/} Ursus supports adoption of these proposals, but they must be applied uniformly regardless of whether a dominant foreign carrier has an interest in or controls a U.S. carrier or a U.S. carrier has an interest in or controls a dominant foreign carrier.

Foreign Entry Test

In its NPRM, the FCC has proposed to stop applying the Effective Competitive Opportunities (“ECO”) test to carriers from World Trade Organization (“WTO”) member states because, in the Commission’s view, liberalization commitments and regulatory safeguards would be “adequate to protect competition in the U.S. telecommunications market.”^{9/} Under this proposal, however, the FCC would deny an application from a carrier from a WTO member state if the application posed “a very high risk to competition”^{10/} or where the foreign affiliate “has engaged in a pattern of anticompetitive or fraudulent conduct in a foreign market.”^{11/} The FCC has queried whether it should also, when examining a Section 214 application from a foreign affiliated carrier, examine the extent of a WTO member state’s commitment in determining whether an application presents a threat of anticompetitive activity.^{12/}

Ursus applauds the FCC’s efforts to find a suitable alternative to the ECO test. The FCC rightly believes that the WTO agreement, if implemented, can achieve the same public interest benefits that the

^{5/} See *Market Entry and Regulation of Foreign Entities, Report and Order*, 11 FCC Rcd 3873 (1995) (“Foreign Entry Order”), *recon. pending*.

^{6/} *WTO NPRM* at ¶¶ 39-41.

^{7/} *Id.* at ¶¶ 92-103.

^{8/} *Id.* at ¶¶ 104-110.

^{9/} *Id.* at ¶ 39.

^{10/} *Id.* at ¶ 40.

^{11/} *Id.* at ¶ 41.

^{12/} *Id.* at ¶ 47.

FCC sought through the ECO test. The FCC also correctly recognizes, however, that all countries will not implement a competitive market at the time the WTO agreement becomes effective. Although the FCC should not base market entry decisions solely on the status of competition in the applicant's country of affiliation, the Commission may appropriately limit U.S. market entry where a foreign carrier is likely and has the ability to act anticompetitively on a route, examining such factors as whether the foreign carrier has engaged in a pattern of anticompetitive activity that would indicate its willingness to act similarly on the route in question. Carriers seeking to demonstrate anticompetitive behavior by the foreign carrier could provide evidence that the foreign carrier has inhibited competition in the foreign country by acting to prevent competitors from providing already-liberalized services or has inhibited competition in the United States by discriminating in its handling of operating agreements or otherwise interfering with U.S. carriers' ability to route traffic to that country.

Dominant Carrier Safeguards

With respect to the safeguards that the Commission should apply to foreign affiliated carriers on affiliated routes, Ursus supports the FCC's proposal to impose "supplemental" dominant carrier safeguards on dominant carriers from WTO member states where competition is not yet established.^{13/} Foreign carriers with market power in these countries may have the additional ability to leverage their market power to distort competition in the U.S. market, and additional safeguards can be tailored to address the additional ability such carriers have to act anticompetitively in the absence of competition in their home market.^{14/} The Commission should continue not to distinguish between U.S. carriers that are dominant by virtue of an ownership interest in foreign carriers and U.S. carriers that are dominant by

^{13/} The FCC currently imposes "dominant carrier" safeguards on U.S. carriers whose foreign affiliates have market power on a destination route. A carrier regulated as dominant on a particular route must apply to the FCC before activating additional circuits on that route. Such a carrier must also file quarterly traffic and revenue reports for a route on which it is regulated as dominant. Finally, a dominant carrier must maintain monthly reports on provisioning and maintenance.

^{14/} One way in which a U.S. carrier can benefit from its interest in a foreign dominant carrier is by taking advantage of that foreign carrier's access to the vast majority of telephone customer information in the foreign market. Ursus therefore urges the Commission to apply its customer proprietary network information ("CPNI") rules to a U.S. carrier's use of foreign market telephone customer information obtained by that carrier's dominant foreign affiliate. SBC's arguments that such a requirement would be unenforceable are unavailing because the FCC would be able to regulate the ability of a U.S. carrier to use customer network information obtained by a foreign affiliate. *See Comments of SBC Communications Inc., IB Docket No. 97-142 (submitted July 9, 1997).*

virtue of a foreign carrier interest in those carriers.^{15/} In Ursus's view, additional dominant carrier safeguards that are so structured and targeted to address specific competitive concerns would be consistent with the United States' MFN and NT obligations under the WTO.

***Application of Foreign Entry Test and Dominant
Carrier Safeguards to all Foreign Carrier Affiliates***

Ursus also endorses the FCC's proposal to discontinue the current limitation on the ECO test to situations where the applicant is affiliated with a foreign carrier through an investment by the *foreign* carrier in the applicant.^{16/} Experience demonstrates that a U.S. carrier that, through its dominant foreign affiliate, acts anticompetitively poses a real anticompetitive threat on a route on which its affiliate has market power. Such affiliations create the same potential as foreign investment in a U.S. carrier for a foreign carrier to distort competition in the U.S. market. Recognizing this threat, the FCC proposes in the NPRM to now apply its entry test and dominant carrier safeguards to U.S. carriers whose interest in a foreign carrier creates an affiliation.^{17/}

Moreover, pursuant to the WTO principle of NT, the FCC must apply to U.S.-owned foreign carriers the same rules it applies to foreign-owned U.S. carriers if the FCC makes a determination that such carriers pose a risk of anticompetitive behavior. Indeed, the FCC recognized in the *Foreign Entry Order* the importance of preventing such carriers from using their affiliates' dominant position to distort competition in the U.S. market. Denying an application based on anticompetitive conduct is a WTO-consistent means to use the FCC's ability to exercise authority over a U.S. carrier to protect competition in the U.S. market. Where there is evidence that the foreign affiliate has acted anticompetitively, the FCC should expressly prohibit the U.S. carrier affiliate from providing any service on the dominant route, and should require discontinuance of previously-authorized service.

Accordingly, the FCC should henceforth deny a Section 214 application filed by any U.S. carrier affiliate of a dominant foreign carrier, regardless of the type of affiliation, if the U.S. carrier's provision of service on a route poses a high risk of anticompetitive behavior.^{18/} To determine whether grant of the

^{15/} See, e.g., *Foreign Entry Order* at ¶ 249.

^{16/} See, e.g., *id.*, ¶¶ 105-06. Under the FCC's rules, a foreign affiliate generally is an entity that has a 25% or greater interest in or control of the applicant or an entity in which the applicant has a 25% or a controlling interest. 47 C.F.R. § 63.18(h).

^{17/} *WTO NPRM* at ¶¶ 40-41.

^{18/} Moreover, given evidence of such conduct, the Commission should limit the scope of extant
(continued...)

application would generate an anticompetitive result, the FCC should examine the same indicators of anticompetitive conduct it would examine if the foreign carrier owned an interest in the U.S. carrier, and reject the application if it finds that such anticompetitive actions are likely to undermine significant Commission public interest goals. Grounds for a denial therefore might include foreign carrier interference with liberalized services in the foreign country, foreign carrier discrimination in entering into or the terms and conditions of operating agreements, or other evidence that the carrier is acting or is likely to act anticompetitively, including attempts by such U.S.-owned carriers to block U.S. carriers from providing call back services from the United States.^{19/}

Adoption of this proposal would serve the public interest notwithstanding the FCC's interest in encouraging U.S. carrier ownership of foreign carriers. The Commission has already found that the public interest in a competitive U.S.-international telecommunications market outweighs the public's interest in foreign ownership by U.S. carriers. For example, the FCC has found that the benefits of its International Settlements Policy outweighed the public interest benefits of a U.S. carrier's ownership and control of the carrier in Guyana.^{20/} Similarly, the United States has expressed clearly its policy in

^{18/} (...continued)

authorizations. Ursus also urges the FCC to limit the ability of U.S. carriers to enter into alternative payment arrangements with affiliated dominant foreign carriers. The FCC proposes to reject an alternative payment arrangement request if "market conditions in the country in question are not sufficient to prevent a carrier with market power from discriminating against U.S. carriers." *Id.* at ¶ 151-152. Ursus supports this approach, but it may not be consistent with MFN principles to the extent that it allows the FCC to discriminate against a carrier based on the status of competition in a WTO member state. A more WTO-consistent approach would be to reject an application for an alternative payment arrangement with an affiliated dominant carrier in the WTO member state.

^{19/} For example, SBC, a U.S. carrier with a controlling interest (through equity-based representation and contractual relationships) in the South African monopoly telephone company, Telkom, soon after the privatization successfully pressured the regulator in South Africa to prohibit call back services, which had existed at the time of the SBC investment. By eliminating call back operators on the U.S.-South Africa route, SBC reduced competition on the route to sustain monopoly profits and in anticipation of SBC's ability to provide international services in conjunction with Telkom. Given this overt attempt to quash incipient competition on this route, the FCC would be within its authority to limit the ability of SBC to provide service between the United States and South Africa until U.S. carriers can provide call back services.

^{20/} See *Atlantic Tele-Network, Inc., Order on Review*, 8 FCC Rcd 4776, 4779-80, ¶¶ 16-17 (1993), *pet. for review denied sub nom., Atlantic Tele-Network, Inc. v. FCC*, 59 F.3d 1384 (D.C. Cir. 1995). In that decision, the Commission stated that "although we support privatization (continued...)"

favor of call back. Call back is a U.S.-licensed and U.S.-tariffed service that U.S. carriers provide to customers in other countries.^{21/} According to the FCC, call back "promotes the public interest by providing increased competition in foreign markets which places significant downward pressure on foreign collection rates, to the ultimate benefit of U.S. consumers and industry whether located within the United States or abroad."^{22/} Although the FCC has stated that, as a matter of comity, it would assist foreign governments in enforcing laws that clearly and explicitly ban call back provided via uncompleted call signaling only, it is no violation of comity principles to prohibit a U.S. carrier or its affiliates from acting in any way that discourages, much less effectively bans, call back to maintain a foreign affiliate's market power in a foreign country. Moreover, while Ursus does not, in this proceeding, ask the FCC to reconsider, as a general matter, its decision to abide by the principles of comity with respect to limited call back prohibition enforcement assistance, the United States should refuse on U.S. public interest grounds to enter into such enforcement actions where the ultimate beneficiary will be a monopoly carrier *de facto* or *de jure* controlled or substantially controlled by U.S. interests.^{23/}

Conclusion

In this proceeding, the FCC seeks to implement the United States' commitments under the WTO agreement on basic telecommunications services while nurturing competition in the U.S.-international market. These goals require that the FCC take decisive action to protect against anticompetitive activity, but that it do so in an evenhanded manner. While Ursus thus supports the FCC's proposal to (1) reject applications that pose a high risk to competition and (2) impose additional dominant carrier safeguards on certain foreign-affiliated carriers, the FCC must apply this principle both to U.S. carriers

^{20/} (...continued)

initiatives such as this effort in Guyana, we believe that ATN's investment in Guyana's telephone system does not warrant special treatment for ATN given the potential for anticompetitive conduct presented by GT&T's monopoly position in Guyana. We accordingly conclude that ATN does not justify its proposal to deviate from our policy of proportionate return or its request that we modify the other nondiscrimination safeguards imposed in the Bureau ATN order."

^{21/} Interference by U.S.-owned carriers with call back services therefore has a direct and adverse impact on the provision of U.S.-based services by U.S. carriers. Indeed, banning call back service is just another means for a U.S. carrier to inhibit competition on the end-to-end route which it dominates.

^{22/} *VIA USA, Ltd., Telegroup, Inc., Discount Call International Co., Order on Reconsideration*, 10 FCC Rcd 9540 (1995).

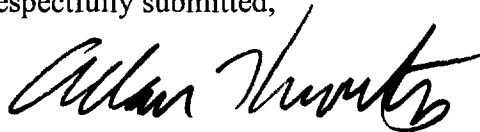
^{23/} Significantly, in the South Africa situation, it was only after SBC acquired control of Telkom that the regulator declared call back illegal.

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with an affiliation interest in dominant carriers abroad and to U.S. carriers that are owned by an affiliated foreign carrier. Such equal treatment is mandated by WTO principles and by the FCC's public interest goals of promoting competition on U.S.-international routes. Moreover, the highest risk to competition is from a U.S. carrier whose foreign affiliate has acted to reduce competition on the international route on which it has market power. The FCC must therefore reject any Section 214 application by or limit any previously-authorized Section 214 authorizations of a U.S. carrier whose foreign affiliate has attempted to reduce competition, *e.g.*, in connection with international operating agreements, with liberalized services, with the operation of call back services, or with other areas of international telecommunication.

Please feel free to call us with any questions regarding this matter.

Respectfully submitted,



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Enclosure

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